(8)

MAY 19 2004

Supreme Court, U.S.
FILED
MAY 19 2004
CLERK

No. 03-931

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

JOE ELTON NIXON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether counsel's strategy of conceding guilt, in the face of overwhelming evidence, during respondent's capital trial in order to maintain credibility when arguing for leniency in the sentencing phase constituted ineffective assistance per se, where counsel discussed the strategy with respondent and respondent neither indicated any objection nor gave explicit consent.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	8
Argument:	
Acknowledging a capital defendant's guilt in order to maintain credibility at sentencing is not per se ineffective assistance of counsel where counsel discusses the strategy with the defendant and the defendant raises no objection	11
A. A capital defendant's counsel can reasonably pursue a strategy of conceding guilt in order to maintain credibility at sentencing	11
B. An otherwise sound strategy of acknowledging guilt to enhance arguments for a non-capital sentence is not deficient performance as a matter of law when pursued without explicit client consent	16
1. Counsel does not perform deficiently as a matter of law by pursuing a strategy of conceding guilt after discussing the strategy with the defendant and hearing no objection	16
2. This Court should adhere to the contextual inquiry mandated by *Strickland* rather than adopt a blanket requirement of explicit consent	18
3. A concession of guilt by counsel is not the equivalent of a plea of guilty	21
C. Counsel's acknowledgment of guilt without the defendant's explicit consent does not result in prejudice per se	23
Conclusion	27

TABLE OF AUTHORITIES

Cases: Page

Anderson v. *Calderon*, 232 F.3d 1053 (9th Cir. 2000), cert. denied, 534 U.S. 1036 (2001) 12
Atwater v. *State*, 788 So. 2d 223 (Fla. 2001) 20
Bell v. *Cone*, 535 U.S. 685 (2002) 24
Bell v. *Evatt*, 72 F.3d 421 (4th Cir. 1995), cert. denied, 518 U.S. 1009 (1996) 12, 22
Boykin v. *Alabama*, 395 U.S. 238 (1969) 21
Brookhart v. *Janis*, 384 U.S. 1 (1966) 21
Faretta v. *California*, 422U.S. 806 (1975) 17
Government of the Virgin Islands v. *Weatherwax*, 77 F.3d 1425 (3d Cir.), cert. denied, 519 U.S. 1020 (1996) 17
Haynes v. *Cain*, 298 F.3d 375 (5th Cir.), cert. denied, 537 U.S. 1072 (2002) 12, 18, 27
Hill v. *Lockhart*, 474 U.S. 52 (1985) 26
Jones v. *Barnes*, 463 U.S. 745 (1983) 16, 17, 21-22
Lingar v. *Bowersox*, 176 F.3d 453 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000) 12, 14, 15, 19
Lockhart v. *McCree*, 476 U.S. 162 (1986) 14
McNeal v. *Wainwright*, 722 F.2d 674 (11th Cir. 1984) 20
Monge v. *California*, 524 U.S. 721 (1998) 25
New York v. *Hill*, 528 U.S. 110 (1999) 16, 17
Nixon v. *State*, 572 So. 2d 1336 (Fla.), cert. denied, 502 U.S. 854 (1991) 2, 4, 6, 22
Parker v. *Head*, 244 F.3d 831 (11th Cir.), cert. denied, 534 U.S. 1046 (2001) 12
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 19, 22, 24, 26
Smith v. *Robbins*, 528 U.S. 259 (2000) 22, 26
Strickland v. *Washington*, 466 U.S. 668 (1984) 7, 8, 11, 16, 17, 18, 19, 21, 23
Underwood v. *Clark*, 939 F.2d 473 (7th Cir. 1991) 12, 22

Cases—Continued: Page

United States v. *Cronic*, 466 U.S. 648 (1984) 7, 10, 11-12, 23, 24, 25
United States v. *Gomes*, 177 F.3d 76 (1st Cir.), cert. denied, 528 U.S. 911 and 941 (1999) 12, 18, 22
United States v. *Holman*, 314 F.3d 837 (7th Cir. 2002), cert. denied, 538 U.S. 1058 (2003) 12, 18, 27
United States v. *Ruiz*, 536 U.S. 622 (2002) 21
United States v. *Tabares*, 951 F.2d 405 (1st Cir. 1991) 12
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 17
Wiggins v. *Smith*, 123 S. Ct. 2527 (2003) 16, 19
Yarborough v. *Gentry*, 124 S. Ct. 1 (2003) 11, 12, 17

Miscellaneous:

American Bar Ass'n:
ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003) (*reprinted in* 31 Hofstra L. Rev. 913 (2003)) 13-14, 15, 19, 20, 22
ABA Model Rules of Professional Conduct (2004) 17, 19
ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993) 16-17
Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983) 13, 14, 15, 23
Andrea D. Lyons, *Defending the Death Penalty Case: What Makes Death Different?* 42 Mercer L. Rev. 695 (1991) 14
Victor L. Streib, *Would You Lie to Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 Brandeis L.J. 405 (2004) 13, 14
Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557 (1998) 14-15,
Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323 (1993) 13, 14, 15, 19, 23

In the Supreme Court of the United States

No. 03-931

STATE OF FLORIDA, PETITIONER

v.

JOE ELTON NIXON

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether trial counsel's strategy of conceding guilt, in the face of overwhelming evidence, during respondent's capital trial in order to maintain credibility when arguing for leniency in the sentencing phase constituted ineffective assistance per se, where counsel discussed the strategy with respondent and respondent neither indicated any objection nor gave explicit consent. The United States has a substantial interest in the Court's resolution of that question because claims of ineffective assistance of counsel are frequently asserted on collateral review of federal criminal judgments.

STATEMENT

1. On August 14, 1984, police officers in Tallahassee, Florida, arrested respondent for the murder of Jeanne Bickner. Bickner's body had been discovered in a wooded area the previous day, tied to a tree and badly charred from

burns. Her car, an orange M.G., was found in a drainage ditch and had been burned throughout. *Nixon* v. *State*, 572 So. 2d 1336, 1337-1338 (Fla.), cert. denied, 502 U.S. 854 (1991).

After his arrest, respondent gave a detailed, taped confession. He explained that he approached Bickner at a shopping mall and told her he was having trouble with his uncle's car. Bickner agreed to take respondent to his uncle's home. When they were on the road, respondent struck Bickner in the face. After stopping the car, respondent put Bickner into the trunk and drove to a wooded area, where he removed her from the car and tied her to a tree with jumper cables. Bickner offered to give respondent money and begged him not to kill her. After the two discussed their lives, respondent set fire to Bickner's personal belongings and burned the car's convertible top. He later placed a bag over Bickner's head, set her on fire, and drove away in her car. Bickner burned to death. *Nixon*, 572 So. 2d at 1338.

The evidence at trial included respondent's taped confession, as well as testimony by both respondent's girlfriend and his brother that respondent had confessed to the crime. They explained that respondent had admitted killing a woman by burning her after tying her with jumper cables, had shown them two of the victim's rings, had told them later that he pawned the rings, and had said that he was going to burn the victim's orange M.G. The State also demonstrated that respondent's palm print was on Bickner's car, and introduced a pawn shop receipt signed by respondent for two of Bickner's rings. In addition, witnesses testified that they saw a man later identified as respondent on the afternoon of the murder driving an orange M.G. near the site where Bickner's body was found. *Nixon*, 572 So. 2d at 1338.

2. Respondent was charged with first-degree murder, kidnapping, robbery, and arson, and the State sought a capital sentence. Respondent's trial counsel, Michael Corin, broached with the State the possibility of a guilty plea in exchange for a life sentence. The State refused because of the overwhelming evidence of guilt and the severity of the crime. J.A. 336-339.[1] Corin perceived no benefit in respondent's pleading guilty without a life sentence in exchange. Corin believed, however, that because of the strength of the evidence against respondent, efforts to contest his guilt would impair the credibility of arguments for a non-capital sentence in the sentencing phase of respondent's trial. Corin therefore pursued a strategy of acknowledging respondent's guilt in order to maintain credibility with the jury when arguing at sentencing that respondent's life should be spared. J.A. 254, 261, 457-459, 471-472, 505.

a. In his opening statement in the guilt phase, Corin told the jury that "there will be no question that Jeannie Bickner died a horrible, horrible death" and "that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt." Pet. App. 4a. He also stated that "there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. Likewise that fact will be proved to your satisfaction beyond any reasonable doubt." *Ibid.* Corin explained that "[t]his case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement." *Ibid.*

---

[1] The prosecutor testified in postconviction proceedings that Corin indicated in the plea discussions that respondent had told Corin that respondent would plead guilty in exchange for a life sentence, J.A. 339, but Corin could not specifically recall whether he had discussed the issue with respondent, J.A. 498.

Corin repeated the same theme in his closing argument, stating to the jury, "I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better." Pet. App. 5a. Corin said that the trial judge would "give you some verdict forms that have been prepared," and that "I think that what you will decide is that the State * * * has proved its case." *Ibid.* He explained that, "there will by [your] decision be caused a second part of this trial," and that, "I will hope to be able to argue to you and give you reasons not that [respondent] be spared one final and terminal confinement forever, but that he not be sentenced to die." J.A. 73-74. The jury found respondent guilty on all counts.[2]

b. In the sentencing phase, Corin attempted to show that respondent had long suffered from severe mental and emotional problems, including at the time of the murder. Corin introduced a number of exhibits and presented the testimony of eight witnesses, including respondent's family and friends as well as two mental health experts.

One of the experts, a psychiatrist, testified that "reports from way back showed that there is something about [respondent] that nobody could quite understand, and they felt that there must be something neurologically wrong or some-

[2] Respondent refused to attend most of the trial proceedings, including on the days of Corin's opening and closing arguments. Pet. App. 41a n.3; *Nixon*, 572 So. 2d at 1341-1342. Respondent first declined to be present early in the trial during consideration of pretrial motions; and on a later day, at the time of jury selection, respondent disrobed to his underwear and again refused to enter the courtroom. The trial judge conducted a hearing in respondent's cell, in which respondent threatened to disrupt the proceedings if forced to go to the courtroom and repeatedly reiterated his refusal to attend the proceedings. The judge found that respondent had waived his right to be present in the courtroom, and that forcing him to attend the proceedings would prejudice him before the jury. The trial judge at various points in the trial revisited the issue, but respondent declined to be present for most of the trial. *Ibid.*

thing wrong." J.A. 143. He believed that respondent, while not suffering from "gross psychosis," has "brief psychotic episodes," J.A. 144, and that respondent was suffering from impaired capacity at the time of the murder, J.A. 146-147. The other expert, a psychologist, testified that respondent had "borderline" intelligence and suffered from brain damage, J.A. 160-161, and that his condition was "[n]ot normal in several senses," J.A. 163. He stated that respondent "does better in structured situations," J.A. 171, and believed that death would not be an appropriate sentence because respondent was not "an intact human being," J.A. 174.[3]

In closing arguments, after reviewing the evidence of respondent's mental and emotional problems, J.A. 196-209, Corin argued that respondent should be spared a sentence of death because he has "never been" and "never will be" an "intact human being," J.A. 209. He ended by stating, "it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that." *Ibid.*

The jury recommended that respondent be sentenced to death, J.A. 210, and the trial court imposed a capital sentence. At the close of the proceedings, the trial judge observed that "[o]ne facet of the case that doubtless will come

[3] When asked to give his opinion concerning respondent's competency, the psychiatrist testified that "the law says he's competent and capable of standing trial" but "[h]e's not the most competent individual in the world as far as making decisions is concerned." J.A. 147. Corin had also represented respondent in an unrelated trial five months beforehand and had raised the issue of respondent's competency at that time. Pet. App. 55a-56a. Respondent then was deemed competent to stand trial. In this case, respondent sought relief in the state post-conviction proceedings on the ground that he had been incompetent at the time of trial. *Id.* at 39a n.1. Because the Florida Supreme Court granted relief on respondent's claim of ineffective assistance, the court has not ruled on his competency claim. See *id.* at 55a-57a.

under examination is the tactics, strategy, [and] analysis employed by defense counsel." Pet. App. 59a. The judge expressed his "view that the tactic employed by trial counsel in this case was an excellent analysis of [the] reality of his case." *Id.* at 60a. According to the judge, the evidence of guilt "would have persuaded any jury * * * beyond all doubt," and "[f]or trial counsel to have inferred that [respondent] was not guilty of these offenses would have deprived him of any credibility during the penalty phase." *Ibid.*

3. On appeal, respondent, represented by different counsel, argued that his trial counsel had rendered ineffective assistance by conceding his guilt without obtaining his approval. The Florida Supreme Court remanded for an evidentiary hearing on that claim. *Nixon*, 572 So. 2d at 1338-1339.

The scope of questioning of Corin on remand was limited because respondent refused to waive his attorney-client privilege. *Nixon*, 572 So. 2d at 1339. Corin did testify, however, that he had advised respondent several times that his objective was to save respondent's life and that, if the State were to reject the plea offer, his strategy was to forgo contesting respondent's guilt. J.A. 235-237, 253-255, 260-261. Corin also explained that respondent, when advised of the strategy, raised no objection. J.A. 238, 255-256. The trial court found that "Corin reviewed with [respondent] the defense approach" including "the probability that he would concede" guilt, that respondent "did not protest the strategy," and that respondent had failed to demonstrate that he had not "consent[ed] thereto" or "acquiesce[d] therein." *Nixon*, 572 So. 2d at 1340 n.3. The Florida Supreme Court ultimately declined to resolve the claim because of the limited state of the record. *Id.* at 1340.

4. a. Respondent renewed his ineffective assistance claim in state post-conviction proceedings. The trial court denied relief, ruling that respondent could not demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 21a.

b. A divided Florida Supreme Court remanded for an evidentiary hearing. Pet. App. 37a-70a. While acknowledging that "counsel's strategy may have been in [respondent's] best interest," *id.* at 49a, the court held that it would "find counsel to be ineffective *per se*" if respondent could "establish that he did not consent to counsel's strategy," *id.* at 45a-46a. The court believed that counsel's statements in the guilt phase "were the functional equivalent of a guilty plea," and that respondent thus should prevail if "there was not an affirmative, explicit acceptance by [respondent] of counsel's strategy." *Id.* at 49a. The court determined that respondent need not demonstrate prejudice under *Strickland*, *supra*, because, in the court's view, counsel's strategy amounted to a complete failure of adversarial testing and thus triggered a per se presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984). Pet. App. 44a-46a. If respondent had not explicitly consented to counsel's strategy, the court held, counsel was required instead to follow a strategy of "hold[ing] the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element" by "proof beyond a reasonable doubt." *Id.* at 49a-50a.

c. Respondent did not testify in the hearing on remand. He was required to waive the attorney-client privilege, however, Pet. App. 49a, and Corin testified that, on more than one occasion, he had advised respondent of his planned strategy of not contesting respondent's guilt and focusing on saving respondent's life in the sentencing phase. J.A. 458, 472-473, 480. Corin stated that he would not have pursued that strategy if respondent had raised an objection, but that respondent gave no such indication. J.A. 472, 478. On the

occasions that Corin discussed the trial strategy with respondent, respondent "did nothing." J.A. 486-488, 501.[4]

The trial court ruled that, while respondent "did not provide counsel with an affirmative, explicit consent *in words*," he "did consent to the trial strategy." Pet. App. 34a. The court explained that the "consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with [respondent] and [respondent] would refuse to respond." *Ibid.*

d. A divided Florida Supreme Court reversed and remanded for a new trial. Pet. App. 2a-36a. The court concluded that the evidence demonstrated, "at most," "silent acquiescence" rather than the "affirmative and explicit consent" required by its previous decision. *Id.* at 8a-9a. The court reiterated that, without explicit consent, counsel was required to pursue a strategy emphasizing the State's burden of proof. *Id.* at 9a.

SUMMARY OF ARGUMENT

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was unreasonable and that the deficient performance rendered the result of the trial unreliable. *Strickland* v. *Washington*, 466 U.S. 668 (1984). The Florida Supreme Court erred both in holding that counsel's performance was unreasonable as a matter of law and in holding that the allegedly deficient performance was prejudicial per se.

---

[4] Corin stated that he met with respondent after opening statements, and respondent, who had read about the opening statements in the newspaper, indicated displeasure. J.A. 459-460. Corin also testified that he had discussed the trial strategy with respondent before the trial began and respondent had indicated no objection at that time, J.A. 482-483, and that, by the time of opening statements, the decision had been made to proceed with the strategy of conceding respondent's guilt, J.A. 487-488.

A. A well-recognized goal of defense representation in capital cases is for counsel to avoid compromising the case for leniency in the sentencing phase by presenting a futile guilt-phase challenge in the face of overwhelming evidence. In the circumstances of a particular case, counsel therefore can reasonably conclude that the best strategy for avoiding a capital sentence is to acknowledge the defendant's guilt and thereby maintain credibility with the jury in the sentencing phase.

B. The Florida Supreme Court adopted a blanket rule that, before pursuing such a strategy, counsel must obtain the defendant's explicit and affirmative consent. A strict rule of explicit consent is inconsistent with the fact-specific inquiry mandated by *Strickland*. In this case, respondent refused to attend much of the trial, offered little assistance to counsel in conducting the defense, and gave no reaction when counsel discussed with him the strategy of acknowledging guilt. In those circumstances, it was reasonable for counsel to proceed in accordance with his considered judgment that the best way to avert a capital sentence involved conceding respondent's guilt. That sort of tactical judgment is consistent with counsel's traditional role in conducting the trial. While counsel is obligated to consult with the defendant on important decisions, such as the strategy employed here, counsel met that obligation in this case.

The Florida Supreme Court erred in concluding that a strategy of acknowledging guilt is the functional equivalent of entering a plea of guilty. Unlike a guilty plea, which is sufficient in itself to convict the defendant, a strategy of acknowledging guilt does not waive the defendant's rights to a jury trial or to a determination of guilt by proof beyond a reasonable doubt. Notwithstanding an acknowledgment of guilt, counsel can seek to exclude evidence introduced by the prosecution, and can challenge a conviction on appeal or on collateral review on the ground that the trial was infected by

error. Moreover, in a capital case, if the defendant goes to trial rather than pleads guilty, the prosecution will be required to present much of its evidence at the guilt phase, thereby allowing the sentencing phase to focus centrally on the reasons for sparing the defendant. Thus, a strategy of conceding guilt should not be subjected to a formal and rigid requirement of express client consent on the theory that it is akin to a guilty plea, but instead should be assessed under *Strickland*'s general test of measuring the reasonableness of attorney performance in light of all the circumstances.

C. Even if it were thought that counsel performs deficiently as a matter of law by pursuing a strategy of acknowledging guilt without the defendant's explicit consent, that asserted error is not prejudicial per se. Counsel's failure to obtain explicit consent could cause prejudice only if the defendant would have withheld consent. Given the overwhelming evidence in this case and the pattern of counsel's interactions with respondent, there is no indication that respondent would have withheld his consent to a strategy of forgoing a guilt phase challenge in the interest of maximizing his chances to avoid a capital sentence.

Even if respondent would have withheld consent, the Florida Supreme Court erred in concluding that counsel's strategy represented a complete failure of adversarial testing and thus was prejudicial per se under *United States* v. *Cronic*, 466 U.S. 648 (1984). Far from a complete failure to test the prosecution's case, counsel made a considered judgment that acknowledging guilt presented the best way to overcome the prosecution's case for a capital sentence. *Cronic*'s per se presumption applies to situations in which prejudice is so likely that a case-by-case inquiry into prejudice is unwarranted. There is no basis for applying a blanket presumption of prejudice when counsel has made a reasoned determination that the evidence against the defendant is so

overwhelming that any effort to contest it would sacrifice his credibility and undermine efforts to save his client's life.

ARGUMENT

ACKNOWLEDGING A CAPITAL DEFENDANT'S GUILT IN ORDER TO MAINTAIN CREDIBILITY AT SENTENCING IS NOT PER SE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL DISCUSSES THE STRATEGY WITH THE DEFENDANT AND THE DEFENDANT RAISES NO OBJECTION

In view of the strength of the evidence against respondent, trial counsel made a reasonable judgment not to contest respondent's guilt in an effort to bolster the credibility of the case for leniency in the sentencing phase. Counsel did not render ineffective assistance per se by pursuing that strategy after he discussed it with respondent and respondent indicated no objection, notwithstanding that respondent had not given an affirmative and explicit consent.

A. A Capital Defendant's Counsel Can Reasonably Pursue A Strategy Of Conceding Guilt In Order To Maintain Credibility At Sentencing

1. "The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough* v. *Gentry*, 124 S. Ct. 1, 4 (2003) (per curiam); *Strickland* v. *Washington*, 466 U.S. 668 (1984). Counsel, however, enjoys "wide latitude * * * in making tactical decisions," and "strategic choices made" among "plausible options are virtually unchallengeable." *Id.* at 689-690. Contesting guilt may not be a "plausible option[]," *id.* at 690, when the evidence is overwhelming, and "the Sixth Amendment does not require that counsel do what is impossible * * * . If there is no bona fide defense to the

charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States* v. *Cronic*, 466 U.S. 648, 656-657 n.19 (1984).

Accordingly, counsel confronted with overwhelming evidence of guilt on a charge can reasonably adopt a strategy of acknowledging the defendant's guilt in an effort to avoid undermining the credibility of arguments on other charges or on sentencing issues. See *Gentry*, 124 S. Ct. at 6 ("By candidly acknowledging his client's shortcomings, counsel might * * * buil[d] credibility with the jury and persuade[] it to focus on the relevant issues in the case."). As a number of courts have held, when counsel concedes a defendant's guilt as a "tactical decision, designed to lead the jury towards leniency on the other charges and to provide a basis for a later argument * * * for a lighter sentence," such a "tactical retreat[]" is "deemed to be effective assistance." *United States* v. *Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (Breyer, J.) (citation and internal quotation marks omitted); accord *United States* v. *Holman*, 314 F.3d 837, 840 (7th Cir. 2002), cert. denied, 538 U.S. 1058 (2003); *Haynes* v. *Cain*, 298 F.3d 375, 380-382 (5th Cir.), cert. denied, 537 U.S. 1072 (2002); *Parker* v. *Head*, 244 F.3d 831, 840-841 (11th Cir.), cert. denied, 534 U.S. 1046 (2001); *United States* v. *Gomes*, 177 F.3d 76, 83-84 (1st Cir.), cert. denied, 528 U.S. 911 and 941 (1999); *Lingar* v. *Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000); *Bell* v. *Evatt*, 72 F.3d 421 (4th Cir. 1995), cert. denied, 518 U.S. 1009 (1996); *Underwood* v. *Clark*, 939 F.2d 473 (7th Cir. 1991).

2. The same considerations apply in a capital trial when counsel acknowledges guilt in order to enhance the case for sparing the defendant's life in the sentencing phase. See *Parker*, 244 F.3d at 840; *Lingar*, 176 F.3d at 459; see also *Anderson* v. *Calderon*, 232 F.3d 1053, 1087-1090 (9th Cir. 2000), cert. denied, 534 U.S. 1036 (2001); *Bell*, 72 F.3d at 427-430. From defense counsel's perspective, the gravity of the

potential sentence in a capital case heightens the need to maintain strategic focus on the sentencing implications of counsel's actions: "Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible." American Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.9.1 cmt. (Feb. 2003) (*ABA Death Penalty Guidelines*) (internal quotation marks omitted) (*reprinted in* 31 Hofstra L. Rev. 913, 1040 (2003)).

The evidence of guilt against a capital defendant often is overwhelming. See, *e.g.*, Victor L. Streib, *Would You Lie to Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 Brandeis L.J. 405, 414 (2004); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 368 (1993); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 329, 331 (1983). That is in part because prosecutors are more likely to seek a sentence of death if the case for guilt is very strong. See White, *supra*, at 368 n.309. Because the guilt phase evidence may be overwhelming, and because prosecutors, once having decided to bring a capital charge, may be disinclined to exchange a life sentence for a guilty plea, see *ABA Death Penalty Guidelines* 10.9.1 cmt. (31 Hofstra L. Rev. at 1041), "attorneys familiar with capital cases view the penalty trial as the probable focal point of the capital case." White, *supra*, at 325; see Goodpaster, *supra*, at 331 ("[B]ecause of the strength of the evidence of guilt, the penalty phase trial is the only real trial the defendant will receive.").

In light of that focus, a basic rule of representation in capital cases is to avoid taking a position in the guilt phase that could compromise arguments for leniency in the sentencing phase. "Ideally, the theory of the trial must complement, support, and lay the groundwork for the theory of

mitigation. Consistency is crucial because * * * counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime." *ABA Death Penalty Guidelines* 10.11 cmt. (31 Hofstra L. Rev. at 1059) (internal quotation marks and footnote omitted); see *id.* at 10.10.1 cmt. (31 Hofstra L. Rev. at 1047-1048); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1558-1559 (1998); Streib, *supra*, at 409; White, *supra*, at 356-358; Goodpaster, *supra*, at 329. In the words of one attorney, "[i]t is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991); see *Lingar*, 176 F.3d at 459.

In some situations—such as if the evidence of guilt is largely circumstantial or if the defendant acted with others and his individual level of participation in the murder is unclear—counsel might contest the defendant's guilt and pursue a "residual doubt" strategy at sentencing. See Sundby, *supra*, at 1597-1598; Lyon, *supra*, at 710-711. See also *Lockhart* v. *McCree*, 476 U.S. 162, 181 (1986). But when, as in this case, there is overwhelming evidence that a particular person is responsible for a capital murder, contesting the defendant's guilt "could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase." Goodpaster, *supra*, at 329; White, *supra*, at 357. Accordingly, one study showed that capital juries were especially likely to view mitigation evidence favorably "in cases in which the defendant acknowledged from the outset of the trial that he had done the killing." Sundby, *supra*, at 1591-1592; see *id.* at 1595 ("Depending on the

nature of the evidence, the most effective defense at the guilt-innocence phase might be as simple as * * * expressly establish[ing] a theme of accepting responsibility.").

The Florida Supreme Court held in this case, because of the absence of explicit client consent, that rather than acknowledging respondent's responsibility for Bickner's murder, trial counsel was required to pursue a strategy of "clearly articulating to the jury * * * that the State must establish each element of the crime charged" by "proof beyond a reasonable doubt." Pet. App. 49a-50a; see *id.* at 9a. But a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase. Sundby, *supra*, at 1597; see *ABA Death Penalty Guidelines* 10.10.1 cmt. (31 Hofstra L. Rev. at 1047); White, *supra*, at 357; Goodpaster, *supra*, at 329. In short, a "capital case clearly is one situation in which blindly relying on the presumption of innocence and putting the prosecution's evidence 'to the test' may prove to be fatal." Sundby, *supra*, at 1598.[5]

---

[5] See *Lingar*, 176 F.3d at 459 (By conceding guilt of second-degree murder, "counsel could retain some credibility and gain an advantage by winning the jury's trust. Even if the jury convicted Lingar of first-degree murder, the jury might then be more sympathetic to defense witnesses testifying in the penalty phase that Lingar deserved mercy. Given the overwhelming evidence, Lingar could not credibly deny involvement in Allen's killing, and denying all involvement could inflame the jury and incite it to render a death sentence.") (citations omitted).

B. An Otherwise Sound Strategy Of Acknowledging Guilt To Enhance Arguments For A Non-Capital Sentence Is Not Deficient Performance As A Matter Of Law When Pursued Without Explicit Client Consent

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. The inquiry is "highly deferential," *id.* at 689, particularly with respect to informed tactical judgments, which are "virtually unchallengeable," *id.* at 690. Given the ample evidence of respondent's guilt, trial counsel reasonably elected not to contest respondent's guilt in an effort to maintain credibility in the sentencing proceedings that he presumed would follow.

The Florida Supreme Court did not question the soundness of counsel's strategy, recognizing that it "may have been in [respondent's] best interest." Pet. App. 49a. Nor did the court suggest that counsel chose that strategy on the basis of an inadequate investigation. See *Wiggins* v. *Smith*, 123 S. Ct. 2527 (2003); *Strickland*, 466 U.S. at 690-691. The court instead held that counsel performed deficiently as a matter of law by pursuing that strategy without respondent's explicit and affirmative consent. Pet. App. 8a-9a, 46a-49a. That was error.

1. *Counsel does not perform deficiently as a matter of law by pursuing a strategy of conceding guilt after discussing the strategy with the defendant and hearing no objection*

While a criminal defendant has authority over certain "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), counsel bears principal responsibility for the conduct of the defense. See *id.* at 753 n.6; *New York* v. *Hill*, 528 U.S. 110, 114-115 (1999); *ABA Standards for Criminal Justice Prosecution Function and Defense Function* 4-5.2 (3d ed. 1993) (*ABA Standards*). Of particular salience, counsel has responsibility for determining "what arguments to pursue," *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751), and "what defenses to develop," *Wainwright* v. *Sykes*, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). In this case, counsel's strategy of acknowledging respondent's guilt in order to strengthen the case for leniency at sentencing was a judgment about what "arguments" and "defenses" to pursue. Cf. *Gentry*, 124 S. Ct. at 6 ("While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion.").

Although counsel bears principal responsibility for tactical judgments about the conduct of the defense, counsel also must "consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688; see *Government of the Virgin Islands* v. *Weatherwax*, 77 F.3d 1425, 1436 (3d Cir.), cert. denied, 519 U.S. 1020 (1996); *ABA Model Rules of Professional Conduct* 1.4(b) (2004) (*ABA Model Rules*); *ABA Standards* 4-3.8(b), 4-5.2(b). The obligation of consultation serves several purposes. It gives the defendant an opportunity to provide information uniquely in his possession in support of his defense, it ensures counsel's awareness of the defendant's views, and it also generally promotes an effective attorney-client relationship. *Weatherwax*, 77 F.3d at 1436. Moreover, if the defendant disagrees with counsel's judgments and considers the matter to be sufficiently important, he might seek leave to obtain different representation or perhaps to represent himself. *Id.* at 1536-1537; see *Faretta* v. *California*, 422 U.S. 806 (1975).

Counsel's strategy in this case to acknowledge respondent's guilt in the guilt phase was an "important decision[]"

about which he was required to consult with respondent. *Strickland*, 466 U.S. at 688; see *Holman*, 314 F.3d at 840. Counsel satisfied that obligation by discussing alternate defenses and strategies with respondent, J.A. 260-261, 476-477, 501-502, and by advising respondent on several occasions that his objective was to save respondent's life through a strategy of conceding respondent's guilt to maintain credibility at sentencing, J.A. 254-255, 261, 458, 472-473, 480. Respondent "was given the opportunity to express his displeasure," J.A. 238, but "did nothing" in response, J.A. 486-488, 501, neither giving any indication that he objected to the strategy nor explicitly embracing it. Counsel could reasonably infer in those circumstances that respondent tacitly acquiesced in the strategy, and it was not unreasonable for counsel to proceed in accordance with his considered judgment concerning how best to serve respondent's interests.[6]

2. *This Court should adhere to the contextual inquiry mandated by* Strickland *rather than adopt a blanket requirement of explicit consent*

The Florida Supreme Court adopted a per se rule barring trial counsel's strategy of acknowledging guilt in the absence of the defendant's explicit consent. That approach draws a hard-and-fast distinction between "silent acquiescence" and "affirmative and explicit consent," Pet. App. 8a-9a, regardless of the nature of counsel's interactions with the defendant or of the merits of counsel's strategy in a particular case.

[6] Because respondent did not give any indication that he objected to counsel's announced strategic plan to concede guilt in order to preserve credibility at sentencing, and because counsel would not have pursued that strategy if respondent had objected, J.A. 472, 478, this case does not raise the question whether counsel performs unreasonably as a matter of law by pursuing a strategy of acknowledging the defendant's guilt in the face of a specific objection by the defendant. Several courts have noted that pursuing a concession-of-guilt strategy in the face of client objection may raise different issues. See *Haynes*, 298 F.3d at 382 (noting the issue but declining to resolve it); *Gomes*, 177 F.3d at 84 (same).

This Court has rejected such mechanical, "*per se* rule[s] as inconsistent with *Strickland*'s * * * circumstance-specific reasonableness inquiry." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 478 (2000); see *id.* at 479-481; *Wiggins*, 123 S. Ct. at 2535. Rigid rules for judging counsel's conduct fail to "take account of the variety of circumstances faced by defense counsel" and can detract "from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 688-689. Moreover, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. In this case, while counsel desired respondent's "input in how to proceed in the trial," J.A. 319, respondent refused to attend most of the trial proceedings, gave minimal assistance and "little, if any" direction to counsel, J.A. 478-479, and "did nothing affirmative or negative" when counsel discussed the trial strategy with him, J.A. 483.

There is no warrant for applying an inflexible requirement of explicit consent in those circumstances, particularly at the cost of preventing counsel from pursuing what he reasonably views to be the only viable strategy for averting a capital sentence. The Florida Supreme Court's approach runs contrary to the general recognition that a "lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." *ABA Model Rules* 1.2(a); see *Lingar*, 176 F.3d at 458 ("not necessary that [defendant] expressly consent to the concession" of guilt by counsel as tactical measure). In capital cases, moreover, the client often "may be unable or unwilling to provide information necessary for the attorney to represent the client effectively," White, *supra*, at 338, and "[m]any capital

defendants are, in addition, severely impaired in ways that make effective communication difficult," *ABA Death Penalty Guidelines* 10.5 cmt. (31 Hofstra L. Rev. at 1007). Those factors weigh against unduly formalizing counsel-client interactions by interjecting a requirement of explicit and affirmative consent.[7]

The Florida Supreme Court's strict rule of explicit consent also does not give clear guidance to counsel. Statements by counsel alleged to amount to concessions of guilt can come in a variety of forms, and it is unclear precisely what set of words—and what degree of concession—might trigger the requirement of explicit consent. See *McNeal* v. *Wainwright*, 722 F.2d 674, 675 (11th Cir. 1984) (evidence "perhaps" and "at most" establishes guilt of manslaughter). The implications of counsel's statements might vary not only depending on the specific choice of words, but also depending on when they occur in the course of the proceedings. See *Atwater* v. *State*, 788 So. 2d 223, 231 (Fla. 2001) (distinguishing opinion below on ground that counsel in this case made statements in opening argument "before any evidence was presented").

Rather than establishing such "detailed guidelines for representation" depending on what words are used and

[7] The commentary to the *ABA Death Penalty Guidelines* cites the Florida Supreme Court's second opinion in this case (Pet. App. 37a-70a) in observing that "[s]ome decisions require the client's knowledge and agreement." *ABA Death Penalty Guidelines* 10.5 cmt. (31 Hofstra L. Rev. at 1008 n.179); see *id.* at 1010.10.1 cmt. (31 Hofstra L. Rev. at 1047 n.255). But the commentary also explains that "the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that it must be assumed that the client is emotionally and intellectually impaired." *Id.* at 10.5 cmt. (31 Hofstra L. Rev. at 1007) (internal quotation marks omitted). Particularly if that is so, it would be impractical and counterproductive to formalize the interactions between counsel and client in the manner prescribed by the Florida Supreme Court.

when they are stated, *Strickland*, 466 U.S. at 689, the proper course is to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case," *id.* at 690. Under that approach, trial counsel in this case did not perform unreasonably by pursuing a strategy of acknowledging respondent's guilt after he advised respondent of that strategy and respondent indicated no objection or concerns.

3. *A concession of guilt by counsel is not the equivalent of a plea of guilty*

The Florida Supreme Court grounded its strict requirement of explicit consent in its conclusion that counsel's statements acknowledging guilt were the equivalent of a guilty plea. Pet. App. 9a, 47a-49a. That analogy is flawed. As this Court has explained, a "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); see *id.* at 242-243 n.4. A guilty plea thus effects a waiver of several constitutional rights, including the rights to a jury trial and to a determination of guilt by proof beyond a reasonable doubt. See *United States* v. *Ruiz*, 536 U.S. 622, 628-629 (2002); *Boykin*, 395 U.S. at 242. For those reasons, the decision whether to enter a guilty plea is a personal choice that ultimately resides with the defendant. See, *e.g.*, *Jones*, 463 U.S. at 751; *Brookhart* v. *Janis*, 384 U.S. 1, 7 (1966).

Statements by counsel acknowledging the defendant's guilt, in contrast, do not effect a waiver of the right to a jury trial or to proof of guilt beyond a reasonable doubt, let alone supersede the need for a trial altogether. Notwithstanding an acknowledgment of guilt by counsel, the prosecution still must prove the defendant's guilt through competent evidence. Also, the defendant can seek to exclude evidence that is particularly prejudicial and can challenge his conviction on

appeal or post-conviction proceedings based on alleged errors in the trial. In this case, for instance, counsel objected to the introduction of photographs of the victim on the basis that they were unduly inflammatory, and respondent challenged his conviction on appeal on that ground. *Nixon*, 572 So. 2d at 1342-1343. A tactical concession of guilt by counsel thus is not the equivalent of a guilty plea. See *Gomes*, 177 F.3d at 84 ("Counsel's concession was not a guilty plea, which involves conviction *without proof*, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance."); *Bell*, 72 F.3d at 430; *Underwood*, 939 F.2d at 474.[8]

Contrary to the Florida Supreme Court's suggestion (Pet. App. 47a), moreover, counsel's strategy was not inconsistent with respondent's plea of not guilty. If the prosecution declines to exchange a non-capital sentence for a guilty plea, a defendant can rationally decide that it would further his interests to exercise his trial rights, see *ABA Death Penalty Guidelines* 10.9.2 cmt. (31 Hofstra L. Rev. at 1045), including if the trial strategy entails conceding guilt. If the trial is infected by error and the defendant obtains a mistrial or a reversal, the prosecution may be more willing at that point to bargain for a guilty plea rather than retry the case.

Additionally, if the defendant goes to trial instead of pleading guilty and moving immediately to sentencing,

---

[8] This Court has drawn a similar distinction between the decision whether to appeal and decisions concerning the conduct of an appeal. Compare *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000) (defendant has ultimate authority to decide whether to take an appeal), with *Smith* v. *Robbins*, 528 U.S. 259, 287 (2000) (counsel can decide tc forgo filing a brief on appeal based on reasonable determination that there are no meritorious grounds); and *Jones*, 463 U.S. at 751-752 (counsel has discretion to determine what issues to press on appeal and can focus "on one central issue" to the exclusion of others).

"[o]ften, the prosecutor will introduce no additional evidence at the penalty stage but simply will rely on aggravating factors arguably established by the evidence presented at the guilt stage." White, *supra*, at 344. The impact of the prosecution's aggravation case thus may be diminished by the time of the penalty phase, which will focus instead on the reasons for sparing the defendant's life. See Sundby, *supra*, at 1595; Goodpaster, *supra*, at 331-332. In this case, for instance, apart from incorporating by reference its guilt phase presentation, J.A. 102-103, the State's evidentiary case at sentencing consisted solely of introducing copies of the judgments of respondent's prior convictions and conducting a brief examination of one police officer, J.A. 103-106. As a result, counsel's strategy of acknowledging guilt was not incompatible with the decision to go to trial.

C. Counsel's Acknowledgment Of Guilt Without The Defendant's Explicit Consent Does Not Result In Prejudice Per Se

Even if trial counsel rendered deficient performance as a matter of law by pursuing his strategy without respondent's explicit consent, counsel's performance was not prejudicial per se. Cf. *Strickland*, 466 U.S. at 697 (explaining that courts need not address performance before prejudice and may dispose of claims on prejudice grounds when it is "easier" to do so). The general rule for establishing prejudice requires a defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In certain narrow contexts, prejudice is presumed per se, *id.* at 692, including "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The Florida Supreme Court erred in applying that exception in this case.

The Florida Supreme Court's conclusion that trial counsel performed deficiently was based, not on the merits of his strategy of acknowledging respondent's guilt, but on the pursuit of that strategy without respondent's explicit consent. The initial question in assessing whether that purported error was prejudicial, therefore, is whether the failure to obtain explicit consent triggers *Cronic*'s per se presumption of prejudice. If the client would have granted consent to a course of representation that the Florida Supreme Court acknowledged may have been in his best interests, counsel's failure to secure explicit consent could not have been prejudicial. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 484 (2000) (addressing counsel's failure to file a notice of appeal where (as here) "the defendant has not clearly conveyed his wishes one way or the other," and holding that, if "the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything"). In this case, if respondent were unable to demonstrate that he would have withheld consent to proceed with counsel's strategy, "counsel's deficient performance has not deprived him of anything." *Id.* at 484. In view of the overwhelming evidence of respondent's guilt and the potential implications for the sentencing phase of mounting a futile or frivolous guilt-phase defense, there is no reason to assume that respondent would have withheld explicit consent.

More fundamentally, there is no warrant for concluding that counsel's concession of guilt in order to bolster arguments against a capital sentence amounted to an "entire[] fail[ure] to subject to the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659; see *Bell* v. *Cone*, 535 U.S. 685, 696-697 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than a

"fail[ure] to do so at specific points."). The penalty phase of a capital trial "is in many respects a continuation of the trial on guilt or innocence of capital murder," *Monge* v. *California*, 524 U.S. 721, 732 (1998), and assessing the effect of representation must take into account the unique focus of the case on the possible imposition of the death sentence. A reasoned strategic judgment by counsel to concede guilt in order to bolster arguments against a capital sentence is the antithesis of a complete failure to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Far from an outright failure to test the prosecution's case, the strategy reflects a determination that the best way to *overcome* the prosecution's case for death is to acknowledge guilt and thereby enhance the case for leniency at sentencing.

The Florida Supreme Court erroneously focused on whether counsel's strategy entailed a failure of adversarial testing in the guilt phase alone. See Pet. App. 44a. That approach fails to appreciate that counsel aimed to pursue a coherent and consistent strategy across both phases of the trial: to avoid undermining arguments for leniency in the penalty phase, counsel sought to refrain from contesting respondent's guilt in the guilt phase. See Sundby, *supra*, at 1588-1589 ("[I]f the defense does not approach a capital case, even though it is bifurcated, as a unified presentation, it greatly increases the risk that the guilt-phase presentation will doom the case in mitigation during the penalty phase.").

This Court has not suggested that reasoned, tactical judgments of the sort at issue here could trigger *Cronic*'s per se presumption of prejudice. The purpose of that presumption is to address situations in which "the adversary process [is] itself presumptively unreliable." *Cronic*, 466 U.S. at 659. There could be no basis for concluding that a conviction is "presumptively unreliable" when the decision to acknowledge guilt derives from a considered assessment by counsel

that the evidence against the defendant is overwhelming. Insofar as counsel's assessment in that regard may be unreasonable in a particular case, it likely would result in a finding of prejudice under *Strickland*; but there is no warrant for applying *Cronic*'s across-the-board presumption. See *Smith* v. *Robbins*, 528 U.S. 259, 286-287 (2000) (concluding that *Cronic* presumption of prejudice is inapplicable to claim that counsel was ineffective in concluding that there were no meritorious arguments to be raised on appeal, because there is no reason to presume that counsel's assessment was erroneous).

Nor does this case present a situation in which a presumption of prejudice applies because counsel's deficient performance resulted in the denial of an "entire judicial proceeding." *Flores-Ortega*, 528 U.S. at 483. When counsel's errors "cause[] the defendant to forfeit a judicial proceeding to which he was otherwise entitled," *id.* at 485, there is no requirement that the defendant establish that, had the forfeited proceeding taken place, it would have produced a result in his favor. See *id.* at 484 (defendant alleging ineffective assistance based on counsel's erroneous failure to file a notice of appeal need not demonstrate that appeal would have been successful); *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985) (defendant alleging ineffective assistance in connection with advice concerning consequences of pleading guilty need not demonstrate that he would have prevailed had he gone to trial). That rule has no application here. A strategy of conceding guilt in the guilt phase in order to bolster arguments in the sentencing phase does not entail the complete forfeiture of a judicial proceeding. Instead, it reflects a tactical judgment concerning how best to conduct the entire proceeding.

Because a per se presumption of prejudice does not apply in this case, respondent must show a reasonable probability that, but for counsel's statements acknowledging his guilt,

the result of his trial would have been different. See *Holman*, 314 F.3d at 844-845 (applying *Strickland* and finding no prejudice from counsel's strategic acknowledgment of guilt); *Haynes*, 298 F.3d at 380-382 (explaining that *Strickland* rather than *Cronic* applies and finding no prejudice from counsel's tactical concession of guilt). The Florida Supreme Court did not engage that question. Consequently, if this Court were to conclude that counsel's failure to secure explicit consent were deficient performance, it should remand for a determination of prejudice.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General

MAY 2004